Office-Supreme Court, U.S.
FILED
MAY 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1752

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

JOHN F. DESRIS and LEO F. KONRAD,
Petitioners,

v.

THE CITY OF KENOSHA, WISCONSIN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES W. CONWAY,
City Attorney,
Rm. #201,
625 - 52nd Street,
Kenosha, WI 53140,
(414) 656-8061,
Counsel for Respondents.

TABLE OF CONTENTS

I. "RATIONAL BASIS" - REVIEW INAPPROPRIATE AN UNNECESSARY..... 1

II. FOUNDATION FOR EQUAL PROTECTION, "SIMILARLY SITUATED" - REVIEW INAPPROPRIATE AND UNNECESSARY..... 2

III. VALID PUBLIC PURPOSE - NO VIOLATION..... 10

IV. "SIMILARLY SITUATED", A THRESHOLD QUESTION?..... 13

V. OWEN AND MONELL - NO VIOLATION..... 15

VI. RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE - NO VIOLATION.. 17

A. Rule 52(a) Does Not Apply To Summary Judgment Cases..... 18

B. The Pullman-Standard Case Is Not Applicable..... 18

C. There Are No Inferences From The Evidence..... 20

D. Where Findings Do Not Rely Upon The Credibility Of Witnessess, The Force Of The Clearly Erroneous Doctrine Is Mitigated..... 20

E. Rule 52(a) Does Not Apply To Conclusions Of Law Or To Mixed Questions Of Law And Fact..... 21

F. Findings Of Fact Of A Trial Court In Equal Protection Cases Are Not Binding On An Appellate Court in Applying The "Rational Basis" Test..... 22

G. The "Clearly Erroneous" Rule Does Not Apply Where Findings Of Ultimate Fact Are Affected

By A Trial Court's Mis-Apprehension Of The Law..... 24

H. Rule 52(a) Was Not Violated When The Stipulated Facts Were Misquoted..... 25

VII. CONCLUSION 27

TABLE OF AUTHORITIES

CASES: Page(s)

Barry v. Barchi, 443 U.S. 55, 61 L.Ed. 2d 365, 99 S.Ct. 2642 (1979).....23

Bence v. Milwaukee, 107 Wis. 2d 469, 318 N.W. 2d 918 (1982).....9,11

Billings Associated Plumbing, Heating and Cooling Contractors v. State Board of Plumbers, 602 P. 2d 597 (1979).....9

Flemming v. Nestor, 363 U.S. at 612, 4 L.Ed. 2d 1435, 80 S.Ct. 1367 ( ).....23

Fortin v. Darlington Little League, Inc., (1975, CA 1) 514 F.2d 344, 348-349.....22

Hayes v. Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 Sup. Ct. Rep. 350, at 580 of L.Ed. (1887).....2

Martin v. Tamaki, 607 F.2d 307, 310 (1979).....8

Monell v. New York City Department of Social Services, 436 U.S. 658, 56 L.Ed. 2d 611, 98 S.Ct. 2018 (1978).....15,16,17

McGowan v. Maryland, 366 U.S. 420, 426, 6 L.Ed. 2d 393, 399, 81 S. Ct. 1101, 1105 (1961).....22

Owen v. City of Independence, 445 U.S. 622, 63 L.Ed. 2d 673, 100 S.Ct. 1398 (1980).....15,16

Pullman-Standard v. Swint, 72 L.Ed. 2d 66, 102 S.Ct. 1781 (1982).....18,19,21

Ritter v. Morton (1975, CA 9, Idaho) 513 F.2d 942, 949 cert. den. 423 U.S. 947, 46 L.Ed. 2d 281, 96 S.Ct. 362 reh. den. 423 U.S. 1081, 47 L.Ed. 2d 91, 96 S.Ct. 869.....24,25

Silverstein v. United States, 419 F.2d 999 (7th Cir. 1969), cert. den., 397 U.S. 1041 (1970).....19

United States v. Gorham, 536 F.2d 410, 175 U.S. App. D.C. 383 (1976).....27

United States v. Texas Education Agency, Etc., (1977, CA 5 Tex) 564 F.2d 162, cert. den. 443, U.S. 915, 61 L.Ed. 2d 879, 99 S.Ct. 3106.....25

U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 66 L.Ed. 2d 368, 101 S.Ct. 453 (1980).....4,23

Vance v. Bradley, 440 U.S. 93, 59 L.Ed. 2d 171, 99 S.Ct. 939 (1979).....23

Watkins v. Scott Paper Co., (1976, C.A. 5 Ala) 530 F.2d 1159, cert. den. 429 U.S. 861, 50 L.Ed. 139, 97 S.Ct. 163.....21

STATUTES, RULES AND ORDINANCES:

WIS.STAT. sec. 40.65.....12

WIS.STAT. Chap. 41.....5,7

WIS.STAT. sec. 62.13.....2,5,6,7,8,14,16

WIS.STAT. sec. 66.191.....12

Fed.R.Civ.P. 52(a).....17,18,20,21,25

Fed.R.Civ.P. 52(c).....18

Fed.R.Civ.P. 56(c).....19,20

Kenosha, Wisconsin, Ordinance
39-74 (May 7, 1974).....25,26

OTHER AUTHORITY:

Age Discrimination in Employment
Act, 29 U.S.C. sec. 631, Pub. L.
90-202, 512, Dec. 15, 1967,
81 Stat. 607 7

American Juris Prudence (16A) 2d.....3,4

REASONS FOR DENYING THE WRIT

I. "RATIONAL BASIS" - REVIEW INAPPROPRIATE AND UNNECESSARY.

This case was effectively disposed of by the Seventh Circuit Court of Appeals when it ruled against Petitioners on one fundamental issue, to-wit:

> "Are the plaintiffs, as members of the WRF pension plan, similarly situated with firefighters governed by the sec. 62.13 pension plan and thus entitled to equal protection of the law?"

The Seventh Circuit Court of Appeals stated in this regard:

> "Our determination that, for the purpose of a claim based on the Equal Protection clause, the plaintiffs are not similarly situated with firefighters belonging to the sec. 62.13 pension plan makes it unnecessary for us to determine whether a rational basis exists for retiring WRF pension plan members at age 60 and retiring sec. 62.13 pension plan members at age 65. However, were it necessary to decide this issue we would determine that a rational basis does exist for this disparity in age of mandatory retirement."

Although the Respondents contend that the Seventh Circuit Court of Appeals did not error in any respect, Respondents suggest that review of said

court's determination of the "rational basis" issue is inappropriate and unnecessary as such determination is only dicta and as Petitioners could not recover in any event as they are not "similarly situated" with sec. 62.13 firefighters.

II. FOUNDATION FOR EQUAL PROTECTION, "SIMILARLY SITUATED" - REVIEW INAPPROPRIATE AND UNNECESSARY.

The required foundation for an equal protection cause of action is clear, consistent, unambiguous, long established, undisputed and not in need of clarification by this court. As early as 1887, this court held, in Hayes v. Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 Sup.Ct. Rep. 350, at 580 of L.Ed.:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances, and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: "Class legislation discrimination against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects

> alike all persons similarly situated, is not within the Amendment." 113 U.S. 27, 32 (28: 923,925). (emphasis supplied)

The required foundation for an equal protection cause of action, a foundation herein lacking, is summarized in American Juris Prudence:

> "It has been repeatedly said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances,...". (emphasis supplied) 16A Am Jur 2d, sec. 737, at 774.

> "Equal protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary and which is based upon material and substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved. The equal protection clause does not forbid discrimination with respect to things that are different. The test is whether the difference in treatment is an invidious discrimination,...". 16A Am Jur 2d, sec. 738, at 776-777.

> "The Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same." 16A Am Jur 2d, sec. 746, at 807.

> "Classification is an inherent right and power of the legislature, and the

> constitutional guaranty of equal protection does not dispense with all classifications. A differentiation is not necessarily a discrimination. And since the very idea of classification is inequality, inequality in no manner determines the question of constitutionality." 16A Am Jur 2d, sec. 747, at 802.
>
> "The legislative power to classify includes the power to sub-classify within reason." 16A Am Jur 2d, sec. 747, at 806.
>
> "...the difference between the subjects of a legislative classification need not be great, and if any reasonable distinction between the subjects as a basis for the classification can be found, the classification should be sustained; a 'narrow' distinction will suffice." 16A Am Jur 2d, sec. 754, at 841.

A recent pronouncement of this court, U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 66 L.Ed. 2d 368, 101 S.Ct. 453 (1980), at 378-379 L.Ed., provides us with the clearest explanation to date of what the courts are to look for in examining legislative pronouncements challenged on equal protection grounds:

> "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," Flemming v. Nestor, 363 U.S., at 612, 4 L.Ed. 2d

> 1435, 80 S.Ct. 1367, because this court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line drawing. The "task of classifying persons for...benefits...inevitably requires that some persons who have an almost equally strong claim to favorite treatment be placed on different sides of the line." Mathews v. Diaz, 426 U.S. 67, 83-84, 48 L.Ed. 2d 478, 96 S.Ct. 1883 (1970), and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."

Petitioners erroneously argued before the trial court that the appropriate classification of City firefighters is "all City of Kenosha firefighters", assuming sub-classes thereof to be invidious discrimination. There are, however, in reality, two logical classes of firefighters, each being distinguishable from the other; namely, firefighters subject to the retirement provisions of Chapter 41 (WRF) and firefighters subject to the retirement provisions of sec. 62.13, Wisconsin Statutes.

Under Chapter 41, the State set age fifty-five (55) as the mandatory retirement age, but gave the City the option of extending that age

[Stip., paras. 3,9 and 10-Petitioners' Appendix E]. It is not disputed that the City, by Ordinance, could provide for the mandatory retirement of its WRF firefighters.

Under sec. 62.13, the sec. 62.13 Board, which is also empowered to act by virtue of State law, determined the retirement of firefighters who were members of said plan [Stip., paras. 3,4,6,14,15,17 and 18-Petitioners' Appendix E]. Said Board retired its members on the basis of a general age 65 policy. However, there is legal authority to the effect that retirements mandated by said Board should have been processed on a case by case basis following a due process hearing [Stip., para. 14-Petitioners' Appendix E].

It would, therefore, be erroneous to conclude that there is only one class of firefighters entirely under the control of the Respondents. Please note that it is not unusual for mandatory retirement ages to be established through pension plans. Congress recognized the fact that pension plans determine retirement

ages in the 1967 version of the Age Discrimination in Employment Act, 29 U.S.C. sec. 631, Pub. L. 90-202, 512, Dec. 15, 1967, 81 Stat. 607, which contained the following exception thereto:

> "Sec. 4(f). It shall not be unlawful for an employer...(2) To observe the terms of...any bona fide employee benefit plan such as a retirement, pension or insurance plan which is not a subterfuge to evade the purposes of this chapter,...".

The WRF treated its members equally. The sec. 62.13 Board treated its members equally. Equal treatment within said individual plans is not disputed.

Under State law, at all times relevant, the Chapter 41 (WRF) and sec. 62.13 pension plans were autonomous. There is no authority to the effect that one such independent and autonomous body has a duty to adopt the position of another independent and autonomous body. The WRF had no duty to adopt the mandatory retirement policy of the sec. 62.13 Board and vice versa since both pension plans derived their authority to retire their members from State law. The City Common

Council had no duty to establish a mandatory retirement age for its WRF employees which was consistent with the mandatory retirement policies of the sec. 62.13 Board. Under State law, neither pension board is subordinate to the other. For any court to hold that the Common Council, with respect to WRF firefighters, had a duty to adopt the retirement policy of the sec. 62.13 Board would especially make very little sense if a correct interpretation of the duty of the sec. 62.13 Board leads to the conclusion that it must retire its members on a case by case basis following a due process hearing as there have never been any similar legal contentions with respect to the WRF [Stip., para. 14-Petitioners' Appendix E]. The retirement procedures of the sec. 62.13 Board were never a relevant issue in this case since Petitioners were WRF firefighters.

There is case law directly on point supporting Respondents' position. The 9th Circuit, in Martin v. Tamaki, 607 F.2d 307, 310 (1979) held that equal protection does not apply where

differences in pension plans are founded upon two autonomous bodies administering their respective pension plans. The Montana Supreme Court held, in Billings Associated Plumbing, Heating and Cooling Contractors v. State Board of Plumbers, 602 P 2d 597 (1979), that dual regulation is not unconstitutional and that whenever there is dual regulation there will, of necessity, be uneven treatment. The Wisconsin Supreme Court's decision in Bence v. Milwaukee, 107 Wis. 2d 469, 318 N.W. 2d 918 (1982), held that harmonious labor relations and the provision of pension benefits are a valid public purpose (at 484) and that (at 486) "A classification based upon whether an employe was employed on the date that the collective bargaining agreement was executed is a substantial distinction." The instant case is similar in that the date of employment determines to which pension plan an employe belongs. Once an employe is in a plan, the plan itself dictates the level of benefits. Bence held that there was a rational basis for an ordinance which incorporated

provisions governing pensions arrived at through a collective bargaining agreement even though greater pension benefits were provided to employes who retired after a certain date than were accorded employes who retired prior to that date. This issue is similar to the instant case. In the instant case, the date of hire determines the pension plan to which an employe will belong.

The instant case involves only an application of existing law to the specific facts of this case. This court, in the constitutional law field, would not clarify the law or resolve any conflicts among the circuits if it reviewed this matter. Even if there was an error by the Seventh Circuit, which is denied, the Petition should be denied as this court has taken the position that its limited resources are to be utilized to set policy and not to routinely correct Appellate Court errors.

III. VALID PUBLIC PURPOSE - NO VIOLATION.

Petitioners, at 12-15 of their Petition, contend that "...the critical issue is whether

reducing the WRF mandatory retirement age from 65 to 60 rationally furthered any legitimate state purpose". This contention was not expressed by Petitioners as an issue before the Appellate Court prior to a Petition for a rehearing. Petitioners' main brief submitted to the Court of Appeals, at 19, stated:

> "The issue before the court is whether the actions of the Defendants in establishing a mandatory retirement age of 60 for one group of its firefighters and of 65 for other firefighters is rationally related to a legitimate interest of the City."

Arguments on appeal centered on the disparity between retirement ages in the two pension plans, not on how those respective retirement ages were arrived at.

Assuming a legitimate public purpose has to be shown by Respondents, a legitimate public purpose has to be shown for retiring WRF employees at age 60. The Wisconsin Supreme Court, in Bence v. Milwaukee, 107 Wis. 2d 469, 318 N.W. 2d 918 (1982), held that harmonious labor relations and the provision of pension benefits are a valid public purpose. A legitimate public

purpose does not have to be shown by the City for reducting the WRF retirement age from 65 to 60. Further assuming that a legitimate purpose has to be shown for reducing the retirement age, Respondents can show such a legitimate purpose, to-wit:

1) To permit early retirement at full benefits to those employees who desire early retirement. Early retirement provides for the alternative benefits of either time off for relaxation or of time to change fields of employment, perhaps even going into business for oneself, while receiving a guaranteed income from a pension. Petitioners have already conceded that the paying of benefits is a legitimate state purpose. This purpose is not defeated, but rather enhanced by permitting early retirement and subsequent early payment of pension benefits.

2) The City will reduce its exposure to liability for heart and lung disease benefits provided for under sec. 66.191 and sec. 40.65, Wisconsin Statutes, since age increases exposure.

Exposure to normal worker's compensation claims will also be reduced. Even if older employees may not necessarily be more prone to accidents, the impact of accidents that do occur is likely to be more severe. Judicial notice of the aging process will support said contentions.

3) Early retirement will increase promotional opportunities within the department and increased promotional opportunities, even if not immediately available, will spur morale and productivity.

If Petitioners' position were accepted by the courts, every city in the country would face bankruptcy through millions of dollars in lawsuits filed by employees who are members of one pension plan and who desire to procure some perceived benefit available only through a pension plan to which they are not members. At oral arguments, the Seventh Circuit Court of Appeals was quite concerned with the impact this case would have upon large cities having many diverse pension plans and retirement ages.

IV. "SIMILARLY SITUATED", A THRESHOLD QUESTION?

Petitioners contend that the "similarly situated" test is not a threshold question, but rather a part of the "rational basis" test itself. The answer to this question is not material and this question need not be answered, for if Petitioners' are not "similarly situated", they cannot prevail.

Petitioners' argument that there are no real and substantial distinctions between the WRF and sec. 62.13 pension plans flies in the face of a record which shows that there is no similarity whatsoever between said pension plans. They both have different retirement ages, different retirement benefits, different methods for computing benefits, different enabling state legislation, different local implementing legislation determining the actual retirement age, different governing bodies making policy decisions for and supervising the respective plans and different involvement of respective pension plan members in policy making (the sec. 62.13 Board included firefighters as voting members thereof, whereas WRF plan members had no

direct role in policy making and had input into policy only through lobbying).

V. OWEN AND MONELL - NO VIOLATION.

Petitioners contend that this court's decisions in Owen v. City of Independence, 445 U.S. 622, 63 L.Ed. 2d 673, 100 S.Ct. 1398 (1980) and Monell v. New York City Department of Social Services, 436 U.S. 658, 56 L.Ed. 2d 611, 98 S.Ct. 2018 (1978), if applied by the reviewing court, would alter the outcome of this action. This is not true as those cases are not applicable as they are not even remotely on point. The case at hand is an equal protection case. Owen is not an equal protection case, but is a case involving due process in the discharge of a public employee and it is also a case involving immunity defenses. Due process and immunity are not herein at issue. If immunity were an issue in the case at hand, it could only become an issue following a court's finding of a violation of the equal protection of the laws. Immunity is relevant only where there would otherwise be an award of damages. Since the Seventh

Circuit found no violation of equal protection, there is no potential for an award of damages and Owen is not relevant.

Petitioners' most unrealistic argument is one which was clearly rejected by the Court of Appeals; namely, that this court's decision in Monell compels a finding of liability because both pension plans depict the policy of the City. Monell created new law only in the area of immunities, not in the equal protection area. Monell does not make the City liable simply for having a custom or policy. For liability to attach to the City, the City's policy or custom must be constitutionally infirm. If there is no equal protection issue in the first instance or if there is such an issue, but the City has a rational basis for its policy or custom, then Monell is not applicable. The trial court erroneously relied upon Monell in holding the City liable. It appears that once the trial court found that the acts of the sec. 62.13 Board constituted a custom or policy of the City, its attention was diverted away from the true equal

protection issues. Monell has not deprived the City of any defenses previously available to it in the equal protection area.

Monell is being prematurely applied by Petitioners as it is applicable only when a court has first determined that an equal protection violation has occurred. At that point Monell is applied to determine whether or not the City should be liable for such a violation. Liability would attach only where the City was found to have a custom or policy and where more than a respondent superior theory was invoked as a bais for liability. Petitioners and the trial court misinterpreted Monell by construing said decision to impose liability whenever a City has a custom or policy, per se. This position is clearly erroneous as Monell, neither by express language nor by implication, is authority for a trier of fact to abrogate applying the traditional "similarly situated" and "rational basis" tests in equal protection cases.

VI. RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE - NO VIOLATION.

The Seventh Circuit Court of Appeals did not violate Rule 52(a) in reversing the trial court's decision and did not engage in an impermissible trial de novo for the following reasons:

A. Rule 52(a) Does Not Apply To Summary Judgment Cases.

Rule 52(a) states in part:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule...56...".

Rule 56 covers summary judgment. This case was decided by the trial court under Rule 56. Therefore, as findings of fact are not necessary by a trial court in such cases, it is not relevant whether or not the Appellate Court disregarded any findings of fact made by the trial court.

B. The Pullman-Standard Case is Not Applicable.

Pullman-Standard v. Swint, 72 L.Ed. 2d 66, 102 S.Ct. 1781 (1982), cited on page 9 of the Petition is not relevant as that Title VII case involved "...a District Court's findings of fact, arrived at after a lenghty

trial..." (at 72 of L.Ed.).

The dissent of Justice Marshall therein is also not relevant for even if that case involved documentary evidence, documentary evidence may be the subject of dispute and such evidence, introduced at a lengthy trial, is not the equivalent of stipulated facts which form a basis for summary judgment.

The Pullman-Standard case, not being a summary judgment case, did not, by implication, reverse the Seventh Circuit's holding in Silverstein v. United States, 419 F.2d 999 (7th Cir. 1969), cert. den., 397 U.S. 1041 (1970), quoted on pages 9-10 of the Petition, a case which this court refused to review. The Silverstein case is still good law, holding that in a disposition of an action upon a motion for summary judgment, the "clearly erroneous" rules do not apply, since only questions of law are presented. Note that Rule 56(c) of the Federal Rules of Civil Procedure,

buy its very terms, permits summary judgment only where "...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

C. There Are No Inferences From The Evidence.

Respondents deny that the instant case involves any inferences being drawn from the stipulated facts by any court. Therefore, the cases cited by Petitioners in this regard are not relevant.

D. Where Findings Do Not Rely Upon The Credibility Of Witnesses, The Force Of The Clearly Erroneous Doctrine Is Mitigated.

Rule 52(a) states in part:

> "...due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The instant case was not only decided by summary judgment, but it was decided on stipulated facts which were part of the Appellate record. Although the stipulation was denoted a "partial stipulation of facts", it was for the purposes of summary judgment on the equal protection issue, the entire

factual record before the trial court.

Watkins v. Scott Paper Co., (1976, C.A. 5 Ala.) 530 F.2d 1159, cert. den. 429 U.S. 861, 50 L.Ed. 139, 97 S.Ct. 163, held in Footnote 17, at 1172:

> "F.R. Civ. P. 52(a) provides that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Where findings do not rely upon the credibility of witnesses, the force of the clearly erroneous doctrine is mitigated." (citations omitted)

E. Rule 52(a) Does Not Apply To Conclusions Of Law Or To Mixed Questions Of Law And Fact.

The Pullman-Standard case, cited by Petitioners, stated as to Rule 52(a) that the rule does not apply to conclusions of law, at 79 of L.Ed., and to some cases involving mixed questions of law and fact, at 80 of L.Ed.. Once the trial court found, "the plans are different, with each having its own individual characteristics", this finding was a sufficient basis for the trial court to conclude that Petitioners were not similarly situated.

The trial court noted the differences in

the pension plans, but found that those differences were not substantial. The determination of substantiality was a conclusion of law, which could be reversed on appeal. The rationale therefor is that facts relating to whether or not substantial distinctions exist are not provable in the usual sense, but are part and parcel of constitutional judgments which Appellate Courts must make. See Fortin v. Darlington Little League, Inc., (1975, CA 1) 514 F.2d 344, 348-349.

F. Findings Of Fact Of A Trial Court In Equal Protection Cases Are Not Binding On An Appellate Court In Applying The "Rational Basis" Test.

In equal protection cases findings as to a rational basis by a trial court have little weight on appeal. The reason for this is that a defense to an equal protection attack can be based upon "conceived facts". In McGowan v. Maryland, 366 U.S. 420, 426, 6 L.Ed. 2d 393, 399, 81 S.Ct. 1101, 1105 (1961) it was held that a court will not set aside a state's statutory classifica-

tion "if any state of facts reasonably may be conceived to justify it". In Barry v. Barchi, 443 U.S. 55, 61 L.Ed. 2d 365, 99 S.Ct. 2642 (1979), at 377 of L.Ed., this court held that the governmental defendant need not resort to "current empirical proof" to disprove bare allegations. In Vance v. Bradley, 440 U.S. 93, 59 L.Ed. 2d 171, 99 S.Ct. 939 (1979), this court held that in equal protection cases those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker. In Flemming v. Nestor, 363 U.S. at 612, 4 L.Ed. 2d 1435, 80 S.Ct. 1367, as quoted in U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 66 L.Ed. 2d 350, 378-379, 101 S.Ct. (1980), this court held that where there are plausible reasons for legislative action, the inquiry is at an end. "It is of course, constitu-

tionally irrelevant whether this reasoning in fact underlay the legislative decision." The Supreme Court has never insisted that a legislative body articulate its reasons for enacting a statute. From the above cases, it is readily apparent that in equal protection cases we are dealing with conceived facts rather than with empirical proof. An Appellate Court has just as much discretion in conceiving facts as does a trial court. Therefore, no matter what the law is in other cases, in equal protection cases, on appeal, findings of fact by a trial court are totally irrelevant on the "rational basis" issue.

G. The "Clearly Erroneous" Rule Does Not Apply Where Findings Of Ultimate Fact Are Affected By A Trial Court's Misapprehension Of The Law.

In the instant case, the clearly erroneous rule cannot be applied because the trial court misapprehended the law relative to the required foundation for an equal protection claim. See Ritter v. Morton (1975, CA 9, Idaho) 513 F.2d 942,

949 cert. den. 423 U.S. 947, 46 L.Ed. 2d 281, 96 S.Ct. 362, reh. den. 423 U.S. 1081, 47 L.Ed. 2d 91, 96 S.Ct. 869. See also: United States v. Texas Education Agency, Etc. (1977, CA 5 Tex) 564 F.2d 162, footnote 17, at 171-172, cert. den. 443 U.S. 915, 61 L.Ed. 2d 879, 99 S.Ct. 3106.

H. Rule 52(a) Was Not Violated When The Stipulated Facts Were Misquoted.

Petitioners, at 12-15 of their Petition, correctly state that the Appellate Court misquoted the facts. On page 3 of its decision, the Court of Appeals stated:

> "On May 7, 1974, the Kenosha Common Council, exercised this statutory authority by enacting Ordinance No. 39-74, extending the mandatory retirement age for WRF firefighters from age 55 to age 60." (emphasis supplied)

Paragraph 13 of the stipulation of facts stated:

> "Ordinance No. 39-74, passed May 7, 1974, reduced said mandatory retirement age for WRF protective occupation employees to sixty (60)." (emphasis supplied)

This discrepancy is obviously an inadvertent error in the writing of the decision

and is not intended to be a new finding of fact because this error is not material to the Appellate Court's reasoning underlying its decision on the merits. This discrepancy is not material as the basic fact that Ordinance 39-74 set the mandatory retirement age of WRF protective occupation employees at age 60 is consistent in both the Appellate Court's decision and the stipulation of facts. It is not material to the outcome of this litigation as to whether or not the retirement age was raised or lowered to arrive at an age 60 mandatory retirement for WRF protective occupation employees. The "similarly situated" and "rational basis" criteria were applied solely to the fact of age 60 being the mandatory retirement age for WRF protective occupation employees. How age 60 was arrived at is surplusage, said facts being relevant only for the purpose of providing the history of Ordinance 39-74.

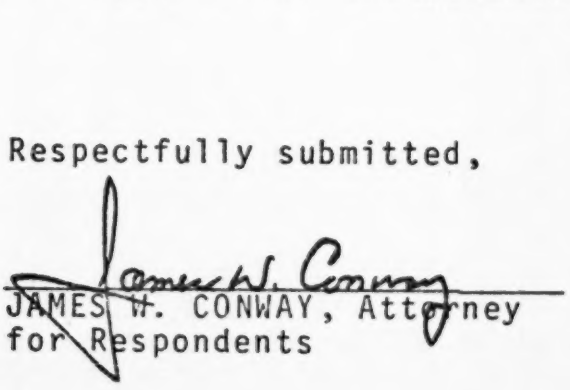
This argument is supported by the case

of United States v. Gorham, 536 F.2d 410, 175 U.S. App. D.C. 383 (1976) wherein the Appellate Court held that a factual statement referred to in a footnote of the Court of Appeal's original decision, which was claimed to have had no basis for support in the record, could not be used as a basis for granting a petition for rehearing where the statement was in no way related to the basis of the decision.

VII. CONCLUSION.

Respondents respectfully submit, for the reasons outlined above, that this court deny the petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



JAMES W. CONWAY, Attorney
for Respondents

Dated: May 16, 1983